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No. 94-225

In The

Supreme Court of the United States

October Term, 1994

WVCH COMMUNICATIONS, INC. and THOMAS H. MOFFIT, et ux.,

Petitioners,

v.

UPPER PROVIDENCE TOWNSHIP, et al.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF OF RESPONDENTS RHONE-POULENC RORER PHARMACEUTICAL, INC., STERLING RESEARCH GROUP AND SUE TIEFENTHALER IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW

1. Whether the Judgment Order of the United States Court of Appeals for the Third Circuit affirming the decision of the District Court that Petitioners had no substantive due process right to be free from delay in local administrative proceedings was contrary to prior decisions of this Court and of the Third Circuit itself.

2. Whether the Court of Appeals correctly affirmed the decision of the District Court dismissing Petitioners' action for a declaratory judgment that federal law pre-empts consideration by a local zoning hearing board of evidence of radio frequency interference where the board denied Petitioners' application to construct a proposed radio station on independent and unrelated grounds.

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BRIEF OF RESPONDENTS RHONE-POULENC RORER PHARMACEUTICAL, INC., STERLING RESEARCH GROUP AND SUE TIEFENTHALER IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents Rhone-Poulenc Rorer Pharmaceutical, Inc. ("RPR"), Sterling Research Group ("Sterling") and Sue Tiefanthaler respectfully request that this Court deny the petition of WVCH Communications, Inc. ("WVCH"), Thomas H. Moffit and Alice E. Moffit (the "Moffits") for a writ of certiorari to review the judgment order of the United States Court of Appeals for the Third Circuit in *WVCH Communications, Inc. v. Upper Providence Township*

and *WVCH Communications, Inc. v. Kalil*, Nos. 93-1711 and 93-1712 (3d Cir. May 4, 1994).[1]

COUNTERSTATEMENT OF THE CASE

A. Nature of the Case

The present petition constitutes the Moffits' latest attempt to obtain federal appellate review of the evidentiary rulings and decision of a local zoning hearing board in proceedings on the Moffits' application to build a six-tower, 50,000-watt radio station in a residential district, even though the Moffits have an appeal pending in state court. Through a combination of misstatements[2] and citations to inapposite authority, the Moffits appear to contend that such unprecedented and plenary federal oversight of local administrative proceedings is necessary to prevent alleged deprivation of a purported substantive due process right to be free from delay. In fact, as discussed below, no such right exists, and the rejection of the Moffits' arguments by the Court of Appeals and the district court was entirely consistent with settled law.

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[1] Pursuant to Supreme Court Rule 29.1, respondents represent that: (a) RPR is a second-tier subsidiary of Rhone-Poulenc Rorer, Inc.; and (b) Sterling is a division of Sterling Winthrop, Inc., which is a subsidiary of Eastman Kodak Company.

[2] The Moffits' so-called "Statement of the Case" contains many allegations not previously pleaded, either in the Moffits' complaints or their briefs below.

B. Factual and Procedural Background

1. The Proceedings Before the Board

a. The Moffits' Application

The Moffits are the owners of WVCH, a for-profit entity presently operating an AM radio station in the Philadelphia area. (Complaint, No. 92-CV-5755 (E.D.Pa.) (the "1992 Complaint")[3], ¶¶ 7, 8, 15 and 77.) In an effort to expand WVCH's broadcast area, the Moffits purchased property in a residential neighborhood in Upper Providence Township (the "Township") with the intention of relocating WVCH's radio studios and erecting six 250-foot towers there, with increased broadcasting power of 50,000 watts. (1992 Complaint, ¶ 77.)

The Moffits chose a 44-acre parcel in the Township for the facility even though the property was (and is) zoned R-1 Residential. The R-1 Residential Zoning Classification permits a number of agricultural and residential uses, but does not allow commercial or industrial uses. (1992 Complaint, ¶ 15.)

The Moffits filed an application (the "Application") before the Upper Providence Township Zoning Hearing Board (the "Board") challenging the Upper Providence Zoning Ordinance (the "Ordinance"), alleging that the Ordinance unconstitutionally excludes radio broadcast facilities from the Township. (1992 Complaint, ¶ 89.) Relying on Pennsylvania's exclusionary zoning doctrine

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[3] As discussed below, the Moffits filed two related complaints in the district court, only the first of which named respondents herein.

and the procedures of the Municipalities Planning Code, the Application alleged that the Ordinance excluded the Moffits' proposed use (a radio broadcast facility, or studio) throughout the Township, resulting in a *de jure* exclusion, and that the Ordinance's height restrictions prohibited construction of the towers, resulting in a *de facto* exclusion.

b. The Law Governing the Moffits' Application

Under Pennsylvania law, the Board could not declare the Ordinance to be exclusionary unless: (a) the Moffits established that (i) it excluded the proposed use entirely from the Township and (ii) the proposed use was not objectionable by nature; and (b) the exclusion was not otherwise justified. *See Township of Paradise v. Mt. Airy Lodge*, 68 Pa. Commw. 548, 552, 449 A.2d 849, 852 (1982).

The successful challenger of an exclusionary zoning ordinance is generally entitled to "receive a bounty in the form of an opportunity to proceed with the requested use." *Cracas v. Board of Supervisors of West Pikeland Twp.*, 89 Pa. Commw. 424, 430, 492 A.2d 798, 801 (1985). Site specific relief, however, is not automatic. Opposing parties are entitled to establish that an applicant's plan is incompatible with a proposed site, *Fernley v. Board of Supervisors of Schuylkill Twp.*, 509 Pa. 413, 422, 502 A.2d 585, 589 (1985), and the Board has authority to determine the suitability of the site for the particular proposed use based on a full factual record. *See Harbucks, Inc. v. Supervisors of Nockamixon Center Hill*, 126 Pa. Commw. 591, 599-600, 560 A.2d 851, 855-56 (1989).

c. The Hearing Before the Board

Respondents RPR and Sterling are unrelated pharmaceutical companies with world headquarters in the Township located approximately one mile and 1/2 mile, respectively, from the Moffits' property. RPR and Sterling intervened in the proceedings before the Board to oppose the Application because of concerns that electromagnetic radiation emanating from a 50,000-watt station would present a potential risk of interference with sensitive research equipment and instruments used by the pharmaceutical companies. (1992 Complaint, ¶¶ 47-49.)

In addition to RPR and Sterling, the Township itself, a citizens group known as Citizens Against Radio Towers ("CART"), allegedly headed by respondent Sue Tiefenthaler (1992 Complaint, ¶ 12), and the Spring-Ford School District and Franklin Heritage Associates, the developer of a proposed townhouse development adjacent to the Moffits' property (Complaint, ¶ 26), all appeared before the Board to oppose the Application.

In the portion of the hearings devoted to the issue of the suitability of the site for the Moffits' proposed use, each party offered testimony concerning, *inter alia*, the magnitude of radio frequency interference ("RFI") and potential risk to neighbors. (Complaint, ¶¶ 31, 50-52.) The Board concluded taking testimony in July 1992, heard final arguments in August 1992, and convened at an advertised public hearing on October 2, 1992 to render its decision.

The Board determined that the Moffits could build their proposed radio station as of right in four other

districts in the Township, including industrial districts that expressly permit utilities and similar installations, and therefore that the Ordinance neither *de jure* nor *de facto* excluded the Moffits' proposed facility from the Township. Because the Board concluded that the Moffits failed to carry their legal burden on the threshold question of proving an exclusion, the Board never reached the factual issues of whether an exclusion would be justified or whether the Moffits' site was a suitable location for a radio station. Accordingly, the Board's decision did not address RFI.

2. The Moffits' State Court Appeal

Under Pennsylvania law, the Moffits had a right to appeal the findings of the Board to the Court of Common Pleas, which is authorized to take additional evidence. 53 P.S. § 11001-A, *et seq.* The Moffits exercised this statutory right by filing a Notice of Land Use Appeal, which, *sub nom Appeal of Thomas H. Moffit and Alice C. Moffit From the Decision of the Upper Providence Township Zoning Hearing Board,* is presently pending in the Court of Common Pleas of Montgomery County, Pennsylvania, No. 92-21993. The Moffits' grounds for their state zoning appeal include all the issues raised in their federal Complaints.

3. The Proceedings Before the District Court

On October 2, 1992, the day that the Board announced its decision, the Moffits filed the 1992 Complaint, naming as defendants the Township, the Board, RPR, Sterling, and Sue Tiefenthaler. The 1992 Complaint

essentially charged that defendants had conspired to delay the hearing process through the introduction and admission of allegedly false and irrelevant evidence concerning the effects of RFI. The Moffits sought, *inter alia*, damages pursuant to 42 U.S.C. § 1983 for a litany of purported constitutional violations and a declaratory judgment that RFI is preempted from local consideration as a matter of federal law.

Defendants moved to dismiss the 1992 Complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). In two opinions dated December 23, 1992 and February 12, 1993, respectively, the district court, *inter alia*: (a) dismissed the Moffits' § 1983 claims based upon purported procedural due process, equal protection and First Amendment violations;[4] (b) declined to dismiss the Moffits' substantive due process claims in light of certain language in *Bello v. Walker*, 840 F.2d 1124 (3d Cir.), *cert. denied*, 488 U.S. 851 (1988); and (c) held that "[p]laintiffs' claim for declaratory relief must be dismissed because there is no live dispute between the parties on the [RFI] issue." (Memorandum of Buckwalter, J. (Dec. 23, 1992), Moffits' Petition for Writ of Certiorari ("Moffits' Pet.") at 25a.)

On April 26, 1993, the Moffits filed a second complaint in this matter, No. 93-CV-2225 (E.D.Pa.) (the "1993 Complaint"), restating the basic factual allegations of the 1992 Complaint but naming as defendants Board members Walter Kalil and Clay Hess, Kalil Printing, Inc., and

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[4] The Moffits have not challenged those aspects of the district court's decision on appeal.

the School Board of Spring-Ford School District. Defendants there filed motions to dismiss the 1993 Complaint, which the district court granted by memorandum and order dated July 15, 1993.

The district court explained its dismissal of the Moffits' substantive due process claim in the 1993 Complaint as follows:

> Subsequent to the issuance of the December 23 memorandum, the Third Circuit Court of Appeals stated that "to prevail on a *substantive* due process claim, a plaintiff must demonstrate that an arbitrary and capricious act deprived them of *a protected property interest.*" *Taylor Invest., Ltd. v. Upper Darby Township*, 983 F.2d 1285, 1290 (3d Cir. 1993) (emphasis added). That decision, together with my re-evaluation of other cases including *Bello*, lead me to conclude that defendants are correct in asserting that plaintiffs must show a protected property interest before being able to state a substantive due process claim. Plaintiffs have made no such showing, and indeed, cannot do so unless and until it is proven that they are entitled to the zoning variance which they sought, an issue currently pending in the state court. Plaintiffs contend that the unreasonable delay in deciding their application is the basis for their substantive due process violation. While defendants' alleged action, if proven, would seem to be a clear example of "deliberate and arbitrary abuse of government power," *Bello*, 840 F.2d at 1129, under the law of this circuit it does not state a

> substantive due process claim unless accompanied by a protected property interest. Therefore, I dismiss plaintiffs' § 1983 count insofar as it is based on substantive due process.

(Memorandum of Buckwalter, J. (July 15, 1993), Moffits' Pet. at 10a-11a.) In conjunction with this decision, the district court issued an order vacating its December 23, 1992 ruling "to the extent that it denied defendants' motion to dismiss the substantive due process count [in the 1992 Complaint]" and granting the motion to dismiss that count. (Order of Buckwalter, J. (July 15, 1993), Moffits' Pet. at 14a.)

4. The Proceedings Before the Court of Appeals

The Moffits appealed from the district court's orders of July 15, 1993, arguing that "an intentional, biased, and politically motivated delay" in an administrative hearing process could itself rise to the level of a substantive due process violation. (Moffits' Appellate Brief at 18). Unable to identify the particular constitutional right of which they were deprived, the Moffits appeared to contend that freedom from delay was itself a "substantive due process Constitutional right." (*Id.* at 24). They were forced to concede the obvious – that "[r]esearching these matters makes [it] plain" that no such right exists – yet insisted that, in the present case, "we would be constrained not to fashion one." (*Id.*)

The Moffits also sought to raise on appeal a purported "federal pre-emption/1st Amendment issue refused by the District Court" with respect to RFI. (*Id.* at 26.) Significantly, they did not challenge – or even

address – the holding of the district court that "there [wa]s no live dispute between the parties on the [RFI] issue," but instead simply requested that the Court of Appeals "review" the RFI issue to "find" that alleged "[f]ederal pre-emption of the electromagnetic broadcast spectrum by the FCC also pre-empts . . . any local zoning regulations or actions" touching upon the RFI question. (*Id.* at 28.)

By Judgment Order dated May 4, 1994, the Court of Appeals, "[a]fter consideration of all contentions raised by the appellants," affirmed the district court's July 15, 1994 Orders in their entirety. (Judgment Order of Court of Appeals (May 4, 1994), Moffits' Pet. at 4a.) A petition for rehearing was denied.

SUMMARY OF ARGUMENT

In an attempt to create an issue worthy of this Court's attention, the Moffits contend in their petition that:

> [t]he opinion of the Court of Appeals for the Third Circuit is in violation of the Due Process Clause of the Fourteenth Amendment and is contrary to, *inter alia*, its own decisions in *Bello v. Walker* and *Taylor Invest, Ltd. v. Upper Darby Township* and is also contrary to this Court's holding in *Daniels v. Williams*, and the opinion of the Court of Appeals for the Third Circuit also fails to recognize the need for FCC preemption of local zoning laws in the location of AM radio stations.

(Moffits' Pet. at 17.) In fact, the Judgment Order dated May 4, 1994 is entirely consistent with settled case law as decided by this Court and followed uniformly by the courts of appeals with respect to substantive due process. The Court of Appeals likewise properly refused to issue an advisory opinion concerning an RFI issue that was not justiciable. The Moffits' petition thus satisfies none of the "special and important reasons" customarily considered by this Court as a basis for granting certiorari.

ARGUMENT

A. The Court of Appeals' Rejection of Petitioners' Argument for a Substantive Due Process Right to Be Free from Allegedly Erroneous Rulings Resulting in Delay in Local Administrative Proceedings Was Consistent with Settled Law

The Fourteenth Amendment to the United States Constitution provides in part that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law." Notwithstanding the breadth of this language, "it is well settled that only a limited range of interests fall within this provision." *Hewitt v. Helms*, 459 U.S. 460, 466 (1983). Accordingly, "the Fourteenth Amendment does not require a remedy" unless there has been some deprivation *"of a protected interest."* *Davidson v. Cannon*, 474 U.S. 344, 348 (1986) (emphasis added).

In *Daniels v. Williams*, 474 U.S. 327 (1986), this Court examined only the nature of the "deprivation" necessary to implicate the Due Process Clause where the requisite

protected interest – in that case, freedom from bodily injury – has already been established. Indeed, in writing for the majority, Chief Justice (then Justice) Rehnquist expressly admonished that "in any given § 1983 suit, the plaintiff must still prove a violation of [an] underlying constitutional right" as a threshold matter. *Id.* at 330. The alternative, to paraphrase the Court, "would trivialize the centuries-old principle of due process of law." *Id.* at 332.

Consistent with *Daniels*, the decisions of the Third Circuit in *Taylor Invest., Ltd. v. Upper Darby Township*, 983 F.2d 1285, and *Bello v. Walker*, 840 F.2d 1124 (3d Cir.), *cert. denied*, 488 U.S. 851 (1988), make clear that a plaintiff cannot state a substantive due process claim for alleged government abuse without establishing some protected interest of which he has allegedly been deprived. *See Taylor*, 983 F.2d at 1292. Although the *Bello* opinion does not directly address the requirement of a protected interest *per se*, plaintiff there possessed such an interest in a building permit – allegedly denied by defendants for partisan political or personal reasons – to which a state court expressly held that he was entitled. Moreover, the *Bello* court based its decision upon authority of this Court, including *Daniels* and *Davidson*, that underscores the need to identify a protected interest in order to state a due process claim.

The Judgment Order of the Court of Appeals affirming the district court's dismissal of the Moffits' Complaints is not – as petitioners erroneously contend – "contrary" to the decision of this Court in *Daniels* or to the prior decisions of the Third Circuit in *Taylor* and *Bello*. (Moffits' Pet. at 17.) The district court ruled that, notwithstanding allegations of irregularities in the zoning

hearing process, plaintiffs could "not state a substantive due process claim unless [such irregularities were] accompanied by [the deprivation of] a protected property interest." (Memorandum of Buckwalter, J. (July 15, 1993), Moffits' Pet. at 11a.) This ruling is consistent not only with the decisions of this Court and of the Third Circuit,[5] but also with the uniform holdings of the other courts of appeals that due process claims in the zoning context are contingent upon the possession of a property interest in the benefit sought.[6]

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[5] The Third Circuit recently reaffirmed that, "[w]hen complaining of a violation of substantive due process rights, a plaintiff must prove that the governmental authority acted to 'infringe[] a property interest encompassed by the Fourteenth Amendment." *Acierno v. Cloutier*, Nos. 93-7456, 93-7617, 1994 U.S. App. LEXIS 16714, *56 (3d Cir. July 7, 1994), quoting *Midnight Sessions, Ltd. v. City of Philadelphia*, 945 F.2d 667, 679 (3d Cir. 1991), *cert. denied*, 112 S.Ct. 1668 (1992).

[6] *See, e.g., Orange Lake Assocs., Inc. v. Kirkpatrick*, 21 F.3d 1214 (2d Cir. 1994) (affirming summary judgment for defendants on due process claim for "unreasonable delays" in approving development application where plaintiff "did not have a vested property interest" therein); *Biser v. Town of Bel Air*, 991 F.2d 100 (4th Cir. 1993) (affirming dismissal of § 1983 action in which plaintiff "claim[ed] that he had been denied due process by the Town's delay in granting his special exception" on grounds that plaintiff's "belie[f] that the Board acted arbitrarily on his application does nothing to change the fact that he was not deprived of any entitlement or right"); *Mahone v. Addicks Util. Dist. of Harris County*, 836 F.2d 921 (5th Cir. 1988) (affirming dismissal of due process challenge to utility district's refusal to annex a particular tract of land where "the discretion apparently granted [the District] by [Texas] statutes" precluded existence of requisite property interest).

The Moffits' contention that the Court of Appeals somehow "stop[ped] short" in affirming the district court's decision because that decision mentioned only "property rights, as opposed to [revealing] a proper appreciation of a citizen's liberty interests" (Moffits' Pet. at 10), is simply wrong. The district court nowhere suggested that the deprivation of a protected liberty interest would not implicate the Fourteenth Amendment; it merely recognized that the Moffits possessed no such interest in this case. Indeed, whatever the precise contours of the constitutional liberty interest may be, *see Ingraham v. Wright*, 430 U.S. 651, 673 (1977), it is axiomatic that they do not extend to a party's voluntary presence at a hearing on his own application for a benefit to which he is not entitled.

To the extent that the Moffits allege a deprivation of a claimed right to a speedy administrative hearing devoid of evidentiary errors, they are claiming no more than a procedural due process violation. Yet the Moffits have never contested the district court's finding that their Complaints failed to state a § 1983 claim for denial of procedural due process because Pennsylvania provides "a meaningful post-deprivation remedy" for any such procedural claims under *Parratt v. Taylor*, 451 U.S. 527 (1981), and *Hudson v. Palmer*, 468 U.S. 517 (1984). (Memorandum of Buckwalter, J. (Dec. 23, 1992), Moffits' Pet. at 20a-21a.) *See also Rogin v. Bensalem Township*, 616 F.2d 680, 695 (3d Cir. 1980), *cert. denied*, 450 U.S. 1029 (1981) (holding that "[i]n Pennsylvania, the procedure for challenging zoning ordinances substantially conforms with the general due process guidelines enunciated by the Supreme Court").

Ultimately, the Moffits have attempted to create a decisional conflict where one does not exist. They ask this Court to do what the Court of Appeals and the district court properly declined to do, namely, to recognize for the first time a distinct substantive due process right to be free from allegedly "arbitrary" delay in local administrative hearings. In rejecting analogous requests, this Court has observed:

> As a general matter, the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended. *Regents of University of Michigan v. Ewing*, 474 U.S. 214, 225-26, 106 S.Ct. 507, 513-14, 88 L.Ed.2d 523 (1985). The doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field.

Collins v. City of Harker Heights, Texas, 112 S.Ct. 1061, 1068 (1992). The Moffits do not and cannot proffer a cogent reason for "break[ing] new ground" in this case.

On the contrary, accepting the Moffits' argument would effectively create a potential federal due process claim every time a local administrative board – or court, for that matter – makes an evidentiary ruling with which a litigant disagrees. To assess the Moffits' purported due process claim in this case would require an exhaustive review of the record of the proceedings before the Board to determine the circumstances under which particular testimony or evidence was admitted or not admitted. Such an undertaking by a federal court would usurp the

state court's function in the proceedings presently pending in the Court of Common Pleas of Montgomery County, Pennsylvania, and would be contrary to the well-settled rule that the role of a federal court "should not be to sit as a zoning board of appeals." *Village of Belle Terre v. Boraas*, 416 U.S. 1, 13 (1974) (Marshall, J., dissenting).

B. Petitioners' Purported Preemption Claim Does Not Present a Justiciable Controversy

Article III of the United States Constitution limits the judicial power of federal courts to actual "cases" and "controversies." This Court has said of this requirement that:

> In part those words limit the business of federal courts to questions presented in an adversary context and in a form historically reviewed as capable of resolution through the judicial process. And in part those words define the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government. Justiciability is the term of art employed to give expression to this dual limitation placed upon federal courts by the case-and-controversy doctrine.

Flast v. Cohen, 392 U.S. 83, 95 (1968). The Moffits' request for a ruling that FCC approval of a radio station must preempt local zoning ordinances fails the test of justiciability in both aspects of the term.

First and foremost, the desired preemption ruling would clearly constitute a purely advisory opinion, and "it is quite clear that 'the oldest and most consistent

thread in the federal law of justiciability is that the federal courts will not give advisory opinions.' " *Id.* at 96, quoting C. Wright, *Federal Courts*, p. 34 (1963). *See also Princeton Univ. v. Schmid*, 455 U.S. 100, 102 (1982) (warning that this Court "do[es] not sit to decide hypothetical issues or to give advisory opinions"). The hearings in which the Board permitted the introduction of RFI evidence have long since concluded, and, because of the Moffits' failure to carry the burden of establishing the unconstitutionality of the zoning ordinance, the Board did not reach the issues of site suitability, including the evidence on both sides concerning electro-magnetic radiation, in its decision.[7] Indeed, the Moffits have never contested the express finding of the district court that "there is no live dispute between the parties on the [RFI] issue" (Memorandum of Buckwalter, J. (Dec. 23, 1992), Moffits' Pet. p. 25a), which itself established the lack of the requisite case or controversy. *See Golden v. Zwickler*, 394 U.S. 103, 110 (1969) (constitutional questions "must be presented in the context of a specific live grievance" to create federal jurisdiction).

The Moffits seem to be attempting to escape the fatal shortcomings in their RFI preemption claim by raising here for the first time the argument that FCC approval of a site for a proposed radio station should as a general matter override local zoning ordinances. They acknowledge that "the FCC has never asserted [its purported]

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[7] In recent years, the effects of electro-magnetic fields have increasingly become a matter of public concern. *See* T. Watson and C. Reiner, "The Scientific and Legal Bases for Litigating EMF Property Cases," in *Current Condemnation Law* (1994).

preemptive authority to ignore local zoning powers in the limited area of locating stations," yet simply proclaim that such authority "undoubtedly exists" and, invoking some ill-defined interest in "optimum use of the airwaves," ask this Court to exercise that purported authority on behalf of the FCC. (Moffits' Pet. at 16.)

The flaws in this argument are several, not the least of which is that the Moffits failed to raise it below. *See Singleton v. Wulff*, 428 U.S. 106, 120 (1976) (enunciating "the general rule . . . that a federal appellate court does not consider an issue not passed upon below"). Additionally, the Moffits' submission of their Application to the Board under the procedures set forth in the Pennsylvania Municipalities Planning Code was an acknowledgement of the Board's authority and the absence of federal preemption. Finally, the judicial usurpation of the FCC's rule-making authority urged by the Moffits (particularly when the FCC is not a party to this action) would violate "the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government." *Flast*, 392 U.S. at 95.

CONCLUSION

For the foregoing reasons, Respondents Rhone-Poulenc Rorer Pharmaceutical, Inc., Sterling Research Group and Sue Tiefanthaler respectfully request that the Court deny the Moffits' petition for writ of certiorari.

Respectfully submitted,

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